IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC.,
Petitioner,

vs.

HARRIS S. McMANN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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INDEX.

Table of Cases.

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On February 22, 1977, this Court granted the Petition of United Air Lines, Inc. (hereinafter "United") for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in this case. This is United's brief on the merits.

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix at page 27. The Opinion of the Court of Appeals is reported at 542 F. 2d 217. A copy appears in the Appendix at page 31.

JURISDICTION.

The Judgment of the Court of Appeals was entered October 1, 1976. United's Petition for a Writ of Certiorari was filed December 30, 1976. Certiorari was granted February 22, 1977. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTE INVOLVED.

The Age Discrimination in Employment Act of 1967, as amended,[1] 29 U. S. C. § 621 *et seq.* (hereinafter, "ADEA" or the "Act"). Section 4(a) (29 U. S. C. § 623(a)) of the Act reads as follows:

"Sec. 4.(a) It shall be unlawful for an employer . . .—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act."

Section 4(f) (29 U. S. C. § 623(f)) of the Act reads as follows:

"(f) It shall not be unlawful for an employer . . .—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause."

1. The Act was amended April 8, 1974 by the Fair Labor Standards Amendments of 1974 (Public Law 93-259, 88 Stat. 55). The 1974 amendments, however, involve changes irrelevant to this case.

Section 5 (29 U. S. C. § 624) of the Act reads as follows:

"Sec. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress."

QUESTION PRESENTED FOR REVIEW.

Is the involuntary retirement of an employee prior to age 65 in observance of the terms of a bona fide retirement plan adopted many years prior to passage of the Act permissible without further justification where the Act expressly provides that it is not unlawful for an employer ". . . to observe the terms of a bona fide . . . retirement . . . plan which is not a subterfuge to evade the purposes of . . ." the Act?

STATEMENT OF THE CASE.

This action was brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired employee of United, requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement at age 60 in observance of the terms of a retirement income plan covering him and other employees in his job classification.

The facts were stipulated.[2] McMann was born January 23, 1913 and hired by United April 14, 1944. While with United he held various jobs, his final position at the time of retirement being that of "Technical Specialist—Aircraft Systems", a management position.

When McMann was hired by United in 1944, United had in existence a formal retirement income plan (hereinafter the "Plan") which provided retirement benefits to employees who were eligible to join and who became members of the Plan.[3] These benefits were provided through a group annuity contract entered into between United and two insurance companies. McMann had opportunity to join the Plan on various occasions after he became an employee, but chose not to do so until 1964.

On January 23, 1964, McMann elected for the first time to join the Plan and signed an application card applying to enter the Plan effective February 1, 1964. The Plain provided that the normal retirement age was age 60. Thereafter, McMann was sent annual statements concerning the benefits he had accrued under the Plan, each such statement showing that his retirement would occur at age 60.

Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60.[4] A representative of the Secretary of Labor, Mr. Robert E.

2. A copy of the Stipulation, with exhibits, appears in the Appendix at page 11 *et seq.*

3. The Plan was adopted in 1941.

4. McMann, although a management employee at the time of his retirement, held a place on the pilots' seniority roster as a result of his holding a union-covered position earlier. In addition to protesting his planned retirement to the Secretary of Labor, McMann filed a grievance under the Pilots' collective bargaining Agreement protesting his involuntary retirement as a breach of the Agreement. The System Board of Adjustment, with Professor Archibald Cox sitting as neutral, denied his grievance without prejudice to McMann's right to pursue his remedy under the Act. A copy of the System Board's Award and the Opinion of Professor Cox appears in the Appendix at page 19 *et seq.*

Ferguson, Area Director, U. S. Department of Labor, Richmond, Virginia, met and conferred with attorneys for McMann and United in investigating McMann's complaint. Subsequent to these conferences, Mr. Ferguson wrote United's attorney on January 18, 1973, stating as follows:

> "This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.
>
> Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.
>
> Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employe benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.
>
> In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office."

On January 31, 1975, McMann filed this lawsuit in the U. S. District Court for the Eastern District of Virginia, Alexandria Division. In essence, McMann asserted that his involuntary retirement on his 60th birthday constituted an act of age discrimination and was unlawful under the Act. The Complaint requested injunctive relief, reinstatement and back pay. United filed its Answer on March 7, 1975 admitting it retired McMann on his 60th birthday, but raising the defense that McMann was retired at age 60 in accordance with the terms of a *bona fide* employee benefit plan within the meaning of Section 4(f)(2)

of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.[5]

On July 15, 1975, United and the plaintiff, McMann, entered into a stipulation of facts. Based thereon, both parties moved for summary judgment. On August 1, 1975, the matter came before the District Court and the motions were argued. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr. presiding, granted United's motion for summary judgment and denied McMann's motion. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case by filing a brief *amicus curiae*. McMann's position before the Court of Appeals remained essentially the same; namely, that United's action in requiring him to retire at age 60 constituted a violation of the Act in that he was a member of the "protected" age group under the Act and the purpose of the Act would allegedly be frustrated if United could utilize his membership in the Plan as a means of terminating his active employment at age 60.[6] The Secretary of Labor joined in McMann's position.

United maintained, on the other hand, that the District Court's decision was correct because the Act expressly permits, as an exception to the provision against age discrimination, an employer to ". . . observe the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan,

5. Section 860.110 reads in relevant part as follows:

". . . the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). * * *"

6. McMann also argued that United's Plan did not by its terms provide for *mandatory* retirement at age 60 since it provided for normal retirement at age 60. The arbitration award of the System Board of Adjustment appearing in the Appendix at page 19, however, rejected this same argument, pointing out that the established practice at United had been to treat the normal retirement date as a mandatory retirement date. The Court of Appeals also rejected this argument. (542 F. 2d at 219.)

which is not a subterfuge to evade the purposes of this Act. . ." United pointed out that its retirement income plan, which provided for retirement at age 60, was a *bona fide* plan paying substantial benefits and since it was instituted many years prior to enactment of the Age Discrimination Act of 1967, it could not possibly be considered a "subterfuge to evade" the purposes of that Act. United relied upon the clear and unambiguous language of § 4(f)(2), the Secretary of Labor's published interpretive regulations and guidelines regarding § 4(f)(2), and the decision of the Court of Appeals for the Fifth Circuit in the case of *Brennan v. Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974) as well as other decisions discussed hereinafter, as authority for its position.

Following oral arguments on June 10, 1976, the Court of Appeals in *McMann* rendered a decision on October 1, 1976 in which it explicity rejected the *Taft* decision and ruled that it is not enough that a retirement benefit plan be *bona fide* and in existence for years prior to the Act. In essence, the Court held that any retirement plan which contains a provision for mandatory retirement earlier than age 65 must be presumed "a subterfuge to evade the purposes" of the Act; that in order to escape condemnation as a "subterfuge," the employer must prove that ". . . [t]here [is] some reason other than age for a plan, or a provision of a plan which discriminates between employees of different ages; that ". . . an early retirement provision must have some economic or business purpose other than arbitrary age discrimination." (542 F. 2d at 220, 221.) Although recognizing that it would be extremely unlikely that United or any employer could demonstrate such a justification,[7] the Court of

7. In connection with an "economic justification," the Court of Appeals observed that "Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits. . . . Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retiree's." (542 F. 2d at 222 and n. 8.)

(Continued on next page)

Appeals remanded the case to the District Court to permit such a showing. United then filed its Petition for a Writ of Certiorari, which this Court granted on February 22, 1977.

SUMMARY OF ARGUMENT.

It is the position of United in this case that the language of Section 4(f)(2) is clear and ambiguous. That language expressly provides that it is not unlawful for an employer to observe the terms of a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. In the case at hand, United's retirement Plan is concededly a bona fide plan which pays substantial benefits. The Plan is not a "subterfuge to evade" the provisions of the Act because, given their ordinary meaning, the words "subterfuge to evade" signify a strategem to avoid the application of the Act. In this case, United's Plan was adopted in 1941, years before the Act was adopted in 1967, and cannot logically be held to have been adopted as a strategem to avoid the application of an Act passed some twenty-six years later.

The Department of Labor is the agency empowered to administer the Act. Contemporaneous with the passage of the Act, representatives of the Secretary of Labor issued interpretations of the Act which expressly stated that involuntary retirements prior to age 65 are permissible under Section 4(f)(2) of the Act as long as such retirements are made pursuant to a retirement plan which meets the requirements of Section 4(f)(2) of the Act; *i.e.*, that the plan is *bona fide* and not a subterfuge to evade the purposes of the Act. This interpretation is still the official, current, published interpretation of the Act. The

(Continued from preceding page)

The only "business justification" suggested by the Court of Appeals for a mandatory retirement age prior to 65 is "where age is a 'bona fide' occupational qualification." (542 F. 2d at 219, n. 3.) That situation is, of course, explicitly provided for in another exception to the Act, § 4(f)(1), 29 U. S. C. § 623(f)(1) and, therefore, the Court's interpretation would make § 4(f)(2) redundant and meaningless.

position taken in this litigation by the Department of Labor to the effect that there must be an "economic" reason for the involuntary retirement provision has never appeared in the Department's published interpretations and is found nowhere in the Act.

The legislative history of the Act, in addition to the language of the Act itself, establishes that Congress did not intend the Act to bar involuntary retirements before age 65 when made pursuant to *bona fide* retirement plans. The legislative history shows, *inter alia*, that Congress specifically rejected a proposal which would have had that effect.

The decision of the Fourth Circuit in the instant case is unique and without precedent in holding that an admittedly *bona fide* retirement plan executed many years prior to passage of the Act will nevertheless be deemed a subterfuge to evade the purposes of the Act unless justified by the employer for business or economic reasons. Decisions of other Circuits, prior to and after the decision of the Fourth Circuit in this case, have not imposed such a test.

ARGUMENT.

I.

United's Retirement Plan Comes Within the Section 4(f)(2) Exception of the Act, Given Its Plain Meaning.

Section 4(a) of the Act prohibits age discrimination among employees in the protected (age 40-65) group by stating in relevant part as follows:

> Section 4(a). It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 4(f)(2) of the Act excepts certain employer actions from the requirements of Section 4(a) by providing as follows:

> Sec. 4(f). It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual . . ."

Given their plain, literal, meanings, the words "to observe the terms of" which appear in the exception permit an employer to apply or implement the provisions of its retirement plan. A *bona fide* plan is by definition one which is made in good faith without fraud or deceit, and which is not specious or counterfeit. As interpreted by the Fifth Circuit in the case of *Brennan* v. *Taft Broadcasting Co., supra,* the term *bona fide* is synonymous with "genuine" or "authentic". (500 F. 2d at 217.) A "subterfuge" is by definition "deception by artifice or strategem to conceal, escape, avoid or evade," the word "evade" meaning to use "craft or strategem in avoidance". (Merriam Webster's Third New International Dictionary, Unabridged.) Judicially, "subterfuge" has been defined as "a device, plan or the like, to which one resorts for escape or concealment; an artifice employed to escape censure or the face of an argument, or to justify opinions or conduct; an evasion." See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521, 523 (D. C. Cir. 1962); *Los Angeles Fisheries* v. *Crook,* 47 F. 2d 1031, 1035 (9th Cir. 1931). The term "subterfuge" implies a purposeful intent to circumvent or evade.

United's Plan clearly meets all definitions of *"bona fide"*, above, and, just as clearly, is not a "subterfuge to evade" the purposes of the Act. United's plan, which the Secretary of Labor and Fourth Circuit concedes is "bona fide", was entered into in 1941 in good faith for the purpose of providing benefits upon retirement to employees who chose to join the plan. It provides

for and has paid substantial retirement benefits to a broad class of workers. It is neither "specious" nor "counterfeit". Further, since it was entered into some twenty six years before the Act was passed, the Plan cannot logically be held to be a "subterfuge to evade" the Act or its purposes. The Act was neither anticipated nor in existence when the Plan was adopted.

Although both phrases "*bona fide*" and "not a subterfuge to evade" are used in Section 4(f)(2), they realistically would not appear to have separate meanings. The Wisconsin Supreme Court noted this fact in analyzing state age discrimination laws, some of which, like those in Wisconsin and New York, permit employers to retire employees in observance of the terms of retirement plans which are not "subterfuges" and others of which permit employers to retire employees in observance of the terms of *"bona fide"* plans. The Wisconsin Supreme Court concluded in the case of *Walker Manufacturing Co.* v. *Industrial Commission,* 27 Wis. 2d 669, 135 N. W. 2d 307, 315 (Wis. Sup. Ct. 1965) that:

> "We are satisfied that there is no essential difference between an age discrimination statute proviso phrased in terms of retirement policies or systems that are not a subterfuge, such as contained in [Wisconsin law] . . . and the corresponding provisions of age discrimination statutes which speak in terms of 'bona fide' retirement or pension plans."

Since United's Plan is conceded to be *"bona fide"* in this case, it follows that it cannot logically be considered a "subterfuge" to evade the purposes of the Act.

II.

The Department of Labor's Published Interpretations and Opinions Support the Proposition That Involuntary Retirements at Any Age Are Permissible as Long as the Express Language of the Act Is Followed.

Representatives of the Department of Labor, which agency is charged with administering the Act, issued interpretations of the Act starting on June 18, 1968, six days after the Act became effective, which interpretations were published in the Federal Register and codified at 29 CFR § 860 *et seq.* In relevant part, as amended in 1969, the interpretations read as follows:

> *"Sec. 860.110 Involuntary Retirement before age 65—*
>
> (a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in Section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional or other arrangements giving rise to involuntary retirement, and any appropriate legislative recommendations to the President and to Congress."

Opinions issued by the Department of Labor's Wage-Hour Administrator have consistently reiterated this position. For example, in an opinion letter date November 15, 1968, the Administrator stated:

> "This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* Opinion ADEA 100, Nov. 15, 1968. (Emphasis added.)[8]

In one of the earliest cases involving an interpretation of Section 4(f)(2) of the Act, *Hodgson* v. *American Hardware Mutual Insurance Co.*, 329 F. Supp. 225 (1971), the Secretary of Labor conceded in his brief filed August 15, 1970 with the District Court that Section 4(f)(2) of the Act authorizes the involuntary retirement of employees who participate in and receive benefits from a retirement benefit plan. To quote from part of the Secretary's brief (p. 11):

> "* * * The section 4(f)(2) exception was only intended by Congress to authorize involuntary retirement of employees who participate in and receive benefits from a retirement benefit plan.
>
> The United States Department of Labor has always taken this position. * * *"

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8. For other published interpretations of the Secretary of Labor and the initial opinions of the Wage and Hour Administrator which permit post- as well as pre-Act plans to provide for mandatory early retirement, see 29 C. F. R. § 860.110 (1976), published at 33 Fed. Reg. 12227-28 (1968) and 34 Fed. Reg. 322 (1969); ADEA Opinions, Wage and Hour Administrator Clarence T. Lundquist, August 14, 1968, September 6, 1968; ADEA Opinions, Acting Wage and Hour Administrator Ben P. Robertson, April 29, 1969 and April 16, 1970; ADEA Opinion, Wage and Hour Assistant Administrator Francis J. Costello, June 29, 1971.

It is significant to note that no official, published interpretation or opinion issued by the Administrator indicates that the words of Section 4(f)(2) have a meaning different from that described in the Secretary's brief, above. Nowhere does the Administrator state in his official publication or opinions that in order for an involuntary retirement provision of a plan to meet the requirements of Section 4(f)(2), that provision must be shown to be based on "business" or "economic" factors. It was not until cases involving involuntary retirement were recently in litigation and in recent reports to Congress that this new definition of a "subterfuge to evade" the purposes of the Act was revealed—and then not in the context of official, published interpretations, but rather in court documents or reports to Congress. In fact, those provisions of the Interpretative Bulletin quoted above remain the Administrator's officially published Interpretations to this day.

It is generally recognized that the interpretations of a statute by the agency empowered to administer that statute are normally entitled to great deference: *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434-35 (1971) and *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225, 228-9 (D. C. Minn. 1971); however, as this Court made clear in its recent decision in *General Electric* v. *Gilbert, et al.*, ... U. S. ....., 97 S. Ct. 401, 411 (1976), a second interpretation contradicting an earlier one issued contemporaneously with the enactment of the statute is not entitled to "high marks" and this Court has appropriately declined in the past to defer to administrative guidelines where they conflicted with earlier pronouncements of the agency. In the case at hand, the position newly enunciated by the Secretary of Labor to the Courts and Congress interprets Section 4(f)(2) differently than the former Secretary's original interpretation issued contemporaneously with the Act.

The Court of Appeals for the Third Circuit, in its recent, well-reasoned, decision issued January 7, 1977, in the case of *Zinger* v. *Blanchette, et al.*, ... F. 2d ....., 14 FEP Cases

497 (3rd Cir. 1977), commented on this change in position of the Secretaries of Labor as follows (14 FEP Cases at 502):

> "The former Secretary of Labor obviously thought that bona fide retirement programs permitting involuntary retirement before age 65 were exempted from the Act. The interpretive bulletin, 29 C. F. R. § 860.110, issued by the Department of Labor soon after enactment of the statute reads:
>
> > 'Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
> >
> > '(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress.[9] (Emphasis supplied.)

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9. The footnote (15) appearing in the *Zinger* text at this point reads as follows:

> "34 F.R. 9709, June 21, 1969. The text has remained unchanged through the 1975 edition of the Code of Federal Regulations despite the Secretary's change in position. See 29 C. F. R. § 860.110.
>
> A working paper prepared for the Senate Special Committee on Aging commented that the study on involuntary retirements had not been completed. It suggested that the Secretary could be asked to prepare a report on whether early involuntary retirement should be continued as an exception and, if so, whether such factors as age and amount of reduced retirement benefits should be considered. Staff of Senate Special Committee on Aging, 93d Cong., 1st Sess. Working Paper on Improving the Age Discrimination Law (Comm. print 1973, p. 18)."

"The bulletin demonstrates the Secretary's recognition of the difference between retirement with and without a pension; the financial effect of the latter being the same as outright discharge. Succeeding Secretaries, however, have revised the Department's position. Pursuant to the statutory directive, the Secretaries have submitted annual reports to Congress through 1976 discussing plans that mandate retirement before age 65. In the report of January 31, 1976, Secretary Brennan articulated the department's position:

> '[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) essential to the plan's economic survival or to some other legitimate purpose—i.e., is not in the plan for the sole purpose [sic] of moving out older workers, which purpose has now been made unlawful by the ADEA.

"This is the interpretation that the Secretary urged upon the courts in both *Brennan* v. *Taft Broadcasting Co., supra.*, and *McMann* v. *United Airlines, supra.*

In adopting this stance, the Secretary ignored the obvious and important distinction implicit in his previous bulletin between discharge without pay and retirement on a pension. Moreover, the Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committee which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed, the Secretary seeks to change the Act by court decision or administrative *fiat*." [Footnote omitted.]

III.

The Legislative History of the Act Supports the Legality of Involuntary Retirements Prior to Age 65 When Made Pursuant to a Bona Fide Pension Plan.

In his *amicus curiae* brief to the Court of Appeals in *McMann*, the Secretary of Labor asserted that ". . . involuntary retirement was never once mentioned during the Congressional debates." (Secretary's brief, p. 19.) Contrary to this assertion, the legislative history establishes that involuntary retirements were discussed and in fact intended to be included within the Section 4(f)(2) exception.

Since the Third Circuit's *Zinger* decision discusses this legislative history at length and provides a complete answer to the Secretary's assertion, it is quoted at length as follows (14 FEP cases 500-502):

> "29 U. S. C. § 623 [Footnote omitted] makes it unlawful to *discharge* an individual because of age. No statutory provision explicitly prohibits early retirement on pension. Only two sections mention "retirement": § 623(f)(2) which exempts observance of a bona fide retirement program; and § 624 which requires the Secretary of Labor to study the institutional arrangement giving rise to involuntary retirement and to report his findings, together with any legislative recommendations, to the President and to Congress.
>
> "The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measureable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. A careful examination of the legislative history demonstrates that, while cognizant of the disruptive effect retirement may have an individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.

"In his message of January 23, 1967, the President recommended legislation covering workers from ages 45 to 64 and 'provided an exception for special situations . . . where the employee is separated under a regular retirement system.' 113 Cong. Rec., pp. 1089-1090. As referred to committee, both Senate and House Bills provided:

> 'Sec. 4(f) It shall not be unlawful . . .
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act.'

"Senator Javits recognized that actuarial considerations in the administration of pension rights might hinder employment of older workers. As he said to the Senate subcommittee:

> 'Now, another problem is the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> 'The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuse not to hire older workers when they might have "hired them under a law granting them a degree of flexibility with respect to such matters. That flexibility is what we recommend.
>
> * * * * *
>
> 'So, Mr. Chairman, in order to meet these needs, I will introduce the following amendments to S. 830.
>
> * * * * *
>
> 'Third, that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems.'[10]

10. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 27-28 (1967). [Footnote 7 in original.]

"Following this statement, Secretary of Labor Wirtz testified:

> 'There is also the effort in S. 830 to make quite claer the relationship which would necessarily be recognized between unjust discrimination and the retirement policies or systems to which Senator Javits has already referred . . . Section 4(a) reflects . . . simply the significant fact that *what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies*, a degree of protection against discrimination on the basis of age very much like what has evolved in private experiences and programs.'[11] (Emphasis supplied.)

"When asked about the effect of the proposed legislation on existing pension and insurance plans, Secretary of Labor Wirtz replied:

> 'It would be my judgment . . . that the effect of the provision in 4(f)(2) [the original bill] . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans.'[12]

"Representatives of organized labor expressed reservations about § 4(f)(2) at the subcommittee hearings in both houses. As a legislative director for the AFL-CIO testified:

> 'We likewise do not see any reason why the legislation should, as is provided in section 4(f)(2) in the Administration bill, permit involuntary retirement of employees under 65. . . . Involuntary retirement would be forced, *regardless of the age of the employee*, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act.'[13]

11. *Id.* at 43. [Footnote 8 in original.]

12. *Id.* at 53. [Footnote 9 in original.]

13. Testimony of Andrew J. Biemiller, Director of Department of Legislation, AFL-CIO, Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 96. *See also* pp. 93, 98, 100. *See also* testimony of Kenneth A. Meiklejohn, legislative representative, AFL-CIO,

(Continued on next page)

"These witnesses later submitted proposed amendments to strike the provision allowing separation under a retirement policy.[14]

"However, the union representatives were not successful in their efforts to remove the retirement provision from the bill, although the protection for seniority systems which they advocated was incorporated in the same section of the Act.

"While the present form of § 4(f)(2) differs slightly from its original form in the Senate and House bills, we do not regard the difference as important. In commenting on the amendments which incorporate the present language of the Act, Secretary of Labor Wirtz, in testifying before the House Committee, stated:

> 'In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point which you raised earlier, the relationship of this to established pension plans. We count that change as not going to the substance and involving matters going to clarification which would present no problem'."[15]

As the Third Circuit also noted in *Zinger*, the text of the Section 4(f)(2) exception is similar to that appearing in New

(Continued from preceding page)

Hearings on H. R. 3651, H. R. 3768, and H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 411, 418. The testimony of both men took place after Senator Javits had proposed his amendments. It is obvious that the union representatives thought that the Javits' amendment did not exclude involuntary early retirement. [Footnote 10 in original.]

14. The proposed amendment was titled "Amendment to Eliminate Provision Permitting Involuntary Retirement From the Age Discriminaton in Employment Act, and to Substitute Therefor Provision Safeguarding Bona Fide Seniority or Merit Systems." It would have deleted any reference in the exception to retirement plans, and thus have made age 65 applicable to them as it was to other forms of discrimination. For a discussion of the effect to be given committee proceedings, *see* National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U. S. 453, 460-461 (1974). [Footnote 11 in original.]

15. Hearings on H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40. [Footnote 12 in original.]

York, Pennslyvania and New Jersey statutes, which statutes were introduced into the record at the Senate Sub-Committee meetings,[16] accompanied by New York's explanatory notes. These unequivocally stated that a plan formulated before enactment of the statute which provided for compulsory retirement on pension at age 60 was lawful. However, if the plans provided no retirement benefits, then the *bona fides* of the plan were subject to scrutiny.[17]

Moreover, Section 5 of the Act (29 U. S. C. § 624), which directs the Secretary of Labor to undertake a study of institutional and other arrangements giving rise to involuntary retirement and to report his findings and any appropriate legislative recommendations to the President and Congress, demonstrates that the subject of involuntary retirements was left to future legislation, since the Act as passed did not ban such retirements.

Clearly, the legislative history establishes that involuntary retirements prior to age 65, pursuant to *bona fide* retirement plans, were not intended by Congress to be banned by that Act. Rather, the language of Section 4(f)(2), as written, was intended by Congress to permit involuntary retirements prior to age 65 as long as the retirement plan was *bona fide; i.e.*, pays reasonable benefits.

IV.

Other Courts Have Rejected the Conclusion Reached by the Fourth Circuit in McMann.

No other court which has ruled on this issue has reached the conclusion of the Fourth Circuit in *McMann*. Prior to the *McMann* decision, the Second, Fifth and Ninth Circuits reached conclusions contrary to *McMann*, as did several district courts.

16. 14 FEP Cases at 502. The hearings referred to were the hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., at 304, 306 (1967).

17. Hearings, *id.* at 251.

Subsequent to *McMann*, and with all decisions including *McMann* before it, the Third Circuit rejected the *McMann* decision in *Zinger*, quoted at length hereinabove.

Prior to the *McMann* decision, the Fifth Circuit, in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974), held that the involuntary retirement of an employee at age 60 pursuant to a retirement income plan which pre-dated the Act and which paid substantial benefits did not constitute age discrimination in violation of the Act. The Fifth Circuit affirmed judgment on behalf of the employer, holding that such retirement was permissible under the clear language of Section 4(f)(2) of the Act. In explaining why the employer's plan met the criteria of Section 4(f)(2), the Fifth Circuit stated that the plan was *bona fide* because it existed, was genuine and authentic, and paid benefits. Its statement appears as follows (500 F. 2d at 217):

> "Given its ordinary and commonly accepted meaning, the term bona fide is synonymous with "genuine" or "authentic", Webster's New Collegiate Dictionary, 1953. The stipulated facts show that Taft did have a plan, that it truly existed, and that Jones was paid approximately $15,000 as a result of it. It was both authentic and genuine. * * *"

With respect to the question of whether the employer's plan was a "subterfuge" which might not come within the Section 4(f)(2) exception, the Fifth Circuit stated (500 F. 2d at 215):

> "Does the defendant-appellee's 'Plan' come within the terms and purposes of the Section 4(f)(2) exception?
> "We respond in the affirmative.
>
> "Taft's 'Plan' was instituted in 1963. Jones exercised his option to participate in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans. Consequently, it included the Section 4(f)(2) exception.
>
> "Its language is plain: 'a bona fide *employee benefit plan* such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter [emphasis ours]'. The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly description sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any.
>
> "Taft's 'Plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."

The Court in *Taft* also rejected the argument that the Section 4(f)(2) exception was available only if there was a "cost" impact on the employer, as urged by the Secretary of Labor. As stated by the Fifth Circuit (500 F. 2d at 217):

> "The primary difficulty [with this approach] is that it attempts to use legislative history to override the unambiguous language of the statute."

In *de Loraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (2nd Cir. 1974), a case decided approximately three months before *Taft*, the Second Circuit Court of Appeals stated: (499 F. 2d at 50):

> "The Age Discrimination in Employment Act provides that it shall not be unlawful for a labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter. . . .' 29 U.S.C. § 623(f)(2). MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. *Thus, the trust is certainly not itself a subterfuge to evade the purposes of the statute. . . .*" (Emphasis added.)

And in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *affirmed* No. 74-2604 (9th Cir. Oct. 15, 1975), the plaintiff baseball umpire contended that the retirement income plan for umpires which called for retirement at age 55 was a subterfuge to avoid the purposes of the Act. Rejecting this contention, the District Court stated (377 F. Supp. at 948):

> "Of course, this Retirement Plan was put into practice long before there was any proscription against employment practices where discrimination because of age was found. *Obviously it could not have been evolved in an attempt to circumvent any public policy or law.*"

In *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Haw. 1976), appeal docketed, No. 76-2874 *sub. nom. Usery* v. *Hawaiian Telephone Co.* (9th Cir. 1976), the Court upheld the involuntary retirement of an employee who was covered by a retirement plan providing for retirement at age 60. The Court ruled that the plan in question was a *bona fide* employee benefit plan within the meaning of Section 4(f)(2) and was not a subterfuge to evade the purpose of the Act because the plan was one which paid substantial benefits.

And in *Dunlop* v. *General Telephone Co.*, ... F. Supp. ....., 13 FEP Cases 1210, appeal docketed, No. 76-2371 *sub nom. Usery* v. *General Telephone Co.* (9th Cir., 1976), the Secretary of Labor filed suit alleging that the defendant telephone company's action in involuntarily retiring seven employees prior to age 65 in accordance with the terms of a retirement plan violated the Act. In that case, the right of the defendant unilaterally to retire salaried employees who were eligible for early retirement was a right which had been in the Plan continuously since 1929. Whether employees were retired early or not made no material difference in the financing of the Plan. The Secretary of Labor conceded that the plan in question was not a subterfuge to evade the purposes of the Act. The District Court found for the defendant, holding that the Section 4(f)(2) exception is "clear and unambiguous," that the plan was "authentic" and "genuine", and was concededly not a "subterfuge" to evade the purposes of the Act.

Also, in *McGovern* v. *United Air Lines, Inc.*, ... F. Supp. ....., Civil Action 75 C 309 (N. D. Ill. 1975), a case involving a United Flight Navigator involuntarily retired at age 60 pursuant to United's retirement income plan, the plaintiff

Navigator made essentially the same arguments concerning his retirement being a violation of the Act as did McMann. The District Court rejected these arguments, stating, in relevant part, that (Slip Opinion, p. 6):

> ". . . The normal retirement date for flight navigators under the plan . . . has been age 60 since 1948. It is clear from this chronology that the plan in question substantially predates the Age Discrimination Act of 1967. We hold, accordingly, that it is a bona fide plan which was not adopted to evade the purposes of the Act."

See also *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225 (D. C. Minn. 1971) (involuntary retirement of plan member at age 62 permissible under Section 4(f)(2); *Grossfield* v. *W. B. Saunders Co.*, 1 FEP Cases 624 (S. D. N. Y. 1968) (denial of injunction restraining involuntary retirement before age 65 on basis that Section 4(f)(2) permits such retirements); *Stringfellow* v. *Monsanto Co.*, 320 F. Supp. 1175 (W. D. Ark. 1970) (Court concluded, *inter alia*, that employer properly observed the terms of a bona fide employee benefit plan in placing on early retirement employees below age 65) and *McKinley* v. *Bendix Corporation*, 420 F. Supp. 1001 (W. D. Mo. 1976) (Involuntary retirement at age 55 under plan which pays substantial benefits meets Section 4(f)(2) requirements and is not unlawful).

Subsequent to the decisions, above, including *McMann*, the Third Circuit, in January, 1977, issued its decision in the *Zinger* case, *supra*. In *Zinger*, the employer railroad had a plan for supplemental pensions which was inaugurated in 1938. Zinger, the plaintiff, was a member of the plan from the time it was inaugurated. The plan provided for the payment of substantial benefits—at least, according to the court, not so insubstantial as to make the plan a sham or "subterfuge". Several months before the plaintiff reached his 65th birthday, the employer railroad retired him involuntarily. The plaintiff thereupon brought suit claiming, *inter alia*, a violation of the ADEA.

The Third Circuit, after examining the language of the Act including, in particular, the Section 4(f)(2) exception, and after tracing the legislative history and Secretary of Labor's interpretations, all as quoted previously, concluded that the involuntary retirement of the plaintiff was permissible under the Act.

According to the Third Circuit, it did not agree with the Fifth Circuit's decision in *Taft* that the existence of a retirement plan which pre-dated the Act meant that the plan could not under any circumstances be a subterfuge to evade the purposes of the Act, nor did it agree with the Fourth Circuit's decision in *McMann* that a business or economic justification must be present before the Section 4(f)(2) exception becomes applicable. The Third Circuit held in *Zinger* that the Act simply was not intended to ban involuntary retirements prior to age 65 by either its language or Congressional intent—that its focus was on hiring and discharge, not retirements—and that as long as a retirement plan was *bona fide* and not a subterfuge, *i.e.*, as long as the plan paid reasonable benefits, then involuntary retirements pursuant to its terms at ages prior to 65 were permissible *irrespective* of whether the plan pre-dated or post-dated the Act. As stated in part by the Third Circuit in *Zinger* (14 FEP Cases at 504):

> "In the case *sub judice*, the parties concede that the plan is bona fide and the pension payable not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the Act. [Footnote omitted.] The sole attack is that the plan's retirement at age 60 provision unlawfully discriminates because of age. An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan—voluntary or involuntary. But that discrimination, existing because of the terms of bona fide retirement plan, is exempt from the scope of the Act, just as is involuntary retirement at any age beyond 65 or before 40. To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful."

V.

United's Retirement Income Plan Is Concededly Bona Fide and Meets the Criteria of Zinger, Taft and Other Decisions; the Criteria Established by the Fourth Circuit in McMann Is Erroneous.

In the *amicus curiae* brief filed by the Solicitor of Labor with the Court of Appeals in *McMann*, the Solicitor concedes that United's plan is *bona fide*, meaning it is a genuine plan which pays substantial benefits. As stated in the Solicitor's brief (pp. 8-9):

> ". . . the language in Section 4(f)(2) sets forth four specific conditions which must be met before the exception applies: (1) the employee benefit plan must be 'bona fide'; (2) the action taken must be in 'observ[ance]' of the terms of that plan; (3) the plan or the particular terms of the plan relied on must not be a 'subterfuge to evade the purposes of [the ADEA]'; and (4) the plan cannot excuse the failure to hire any individual. *United's plan would appear to meet the first of these four conditions—i.e. it is bona fide. . . .*" (Emphasis added.)

The Appellant in the Court of Appeals, McMann, did not assert then or in the District Court below that United's plan was not *bona fide* or that it does not provide reasonable benefits. The Fourth Circuit agreed the Plan is *bona fide*.

This being so, United's plan meets the criteria of *Zinger*, *Taft* and other cases. In *Zinger*, the Third Circuit established the criteria that if the employer has a plan which pays reasonable benefits and provides for involuntary retirement prior to age 65 (whether that plan pre-dates or post-dates the Act) it is lawful. In *Taft*, the criteria established by the Fifth Circuit for lawfulness is that the retirement plan be *bona fide* (authentic and genuine and pay substantial benefits) and not a subter-

fuge to evade the Act (which, it said, it cannot be if the plan was originated well in advance of the ADEA). The decisions of the Second Circuit in *de Loraine* and of the Ninth Circuit in *Steiner*, as well as the District Court decisions cited above, are consistent with *Taft* and *Zinger* insofar as they hold that a retirement plan pre-dating the Act and paying substantial benefits comes within the Section 4(f)(2) exception.

United's plan is concededly *bona fide*, it pays substantial benefits, and long pre-dates the Act. It meets the criteria of *Zinger, Taft, Steiner, de Loraine* and other cases. It clearly falls within the Section 4(f)(2) exception.

The criteria established by the Fourth Circuit in *McMann* is unrealistic, contrary to the plain language of Section 4(f)(2) of the Act, and contrary to the Congressional intent, as revealed by the thorough analysis contained in the *Zinger* decision. The *McMann* decision constitutes an erroneous interpretation of the Act.

CONCLUSION.

For the reasons set forth above, United respectfully requests this Court to reverse the decision of the Fourth Circuit and affirm the judgment of the District Court.

Respectfully submitted,

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